Supreme Court, U.S.
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No. 93-1679

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN ROBERT BRITENBACH

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF TO BRIEF IN OPPOSITION .	1
I. THE INSTANT PETITION MERITS ACCEPTANCE BY THE COURT	1
A. The Sentencing Issue . . .	1
B. The Adequacy of Counsel/ Continuance Issues	11
II. CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases:

Braxton v. United States,
500 U.S. 344 (1991) 8

Stinson v. United States,
113 S. Ct. 1913 (1993) 10

United States v. Allen,
No. 92-1225 (10th Cir.,
May 5, 1994) 3, 5

United States v. Fiore,
983 F.2d 1 (1st Cir. 1992) 3

United States v. Heim,
15 F.3d 830 (9th Cir. 1994) . . . 5

United States v. Hightower,
No. 93-5117 (3d Cir.,
May 31, 1994) 3, 4

United States v. Price,
990 F.2d 1367 (D.C. Cir. 1993) . . 2

Statutes:

28 U.S.C. Section 994(a) 5, 6

28 U.S.C. Section 994(h) 3, 5

28 U.S.C. Section 994(h)(1)(B) . . 4, 5

Sentencing Guidelines:

Section 4B1.1 . . . . . 5, 7

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I.

THE INSTANT PETITION MERITS ACCEPTANCE BY THE COURT

A. <u>The Sentencing Issue</u>

The United States' Brief in Opposition herein (hereafter designated B.I.O.)

postulates two grounds for the assertion that the instant Petition does not warrant this Court's review. First, it is contended that the holding in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), the primary case relied upon by Petitioner, ". . . has not been followed in other circuits, and we believe that the decision was incorrect." (B.I.O., page 10, fn. 6.) While Petitioner is cognizant of the fact that the merits of his claim are not before the Court at this stage of the proceedings, it is necessary to address, at least briefly, the contention that Price was erroneously decided, insofar as it may impact upon the Court's decision to grant or withhold certiorari. Of course, the Government's contention that Price was erroneously decided cannot obscure the fact that a

conflict between circuits presently exists on the construction of the career offender guideline. Aside from the published Ninth Circuit opinion in the Petitioner's own case, the Government notes three other cases in its argument that Price is an incorrect statement of the law: United States v. Hightower, No. 93-5117 (3d Cir., May 31, 1994), United States v. Allen, No. 92-1225 (10th Cir., May 5, 1994), and United States v. Fiore, 983 F.2d 1 (1st Cir. 1992). (B.I.O., page 9.) The Fiore opinion is of little utility in the present context, in that the statutory analysis of 28 U.S.C. Section 994(h), as undertaken in Price, formed no part of the decision in Fiore. In contrast, the Hightower opinion expressly declines to follow Price, based upon two disputable

propositions. Hightower asserts that "the problem is that a 'controlled substance offense' is not explicitly defined in Section 994(h)(1)(B)." Hightower, supra, at 1994 W L 226979, page 3. In fact, Section 994(h)(1)(B) does explicitly define controlled substance offenses by reference to specific penal statutes, none of which include the offense of conspiracy. Hightower further states that "if Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to 'offenses described in' -- not 'convictions obtained under' -- those statutes." Hightower, supra, at 1994 WL 226979, page 3. Putting aside the dubious semantic distinction between "offense described

in" and "convictions obtained under," it is clear that conspiracy is not an offense "described in" Section 994(h)(1)(B).

The Allen case, supra, simply chooses to adopt the reasoning in the Ninth Circuit opinion related to this Petitioner's case, United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994). Like Heim, the Allen opinion asserts that:

> Although the current background commentary to [Guideline] Section 4B1.1 identifies Section 994(h) as the source of the mandate . . . it is clear that the Commission could rely on the broader language of Section 994(a) . . . to include conspiracy related offenses in the career offender guideline.

Allen, supra, at 1994 WL 167838, page 6.

Counsel for Petitioner herein respectfully submits that the foregoing premise is not "clear" at all, inasmuch as Section 994(a) simply purports to empower the Sentencing Commission to draft guidelines, not to expand upon the specific congressional enactment which defines categories of career offenders. The validity of this construction of Section 994(a) is a central issue encompassed within the split of authority underlying the instant petition.

As its second ground to urge denial of certiorari herein, the United States contends that the jurisdictional defect noted in Price is "fully remediable by the Commission itself." (B.I.O., pages 10-11.) It is noted that on December 21, 1993, the Commission issued for comment a proposed amendment to the Commentary for

Guideline Section 4B1.1, wherein the Commission simply asserts that, in accord with the "general guideline promulgation authority under 28 U.S.C. Section 994(a)-(f), the Commission proposes to 'modify' the congressional definition of career offender contained in Section 994(h)." (B.I.O., page 11.) The United States candidly notes that this proposed amendment was not in fact transmitted to Congress (B.I.O., page 11, fn. 7), and it is not asserted that the proposed amendment has been, or presently is intended to be, incorporated into the guidelines. In essence, it appears to be the position of the United States that the publication of the above-referenced guideline amendment, for comment only, renders the split of authority noted herein moot for purposes of a grant of certiorari. Reference is

made to the case of Braxton v. United States, 500 U.S. 344 (1991), in support of that proposition. In Braxton, the issue of law which had generated a split of authority was whether stipulations of fact which establish a more serious offense than that pled to must be expressly incorporated into a formal plea agreement. While Braxton was pending, the Commission published a request for public comment on whether the guideline should be amended to require such express stipulations. The Court declined to treat the issue in Braxton ". . . because the Commission has already undertaken a proceeding that will eliminate circuit conflict. . . ." Braxton, supra, at 348.

Counsel for Petitioner herein respectfully submits that there are two fundamental problems with reliance upon

Braxton. First, the mere fact that the Commission has solicited public comment on a proposed guideline amendment does not necessarily imply that the amendment will be enacted at all, nor that the split of authority addressed in the inchoate amendment will in fact be eliminated thereby. Second, as has been suggested above, counsel for Petitioner does not accept the assumption that the proposed amendment in this case (i.e., an express assertion that the Commission now relies upon the general rule-making authority of Section 994(a)) will in fact resolve the question raised herein, to wit, whether any provision of Section 994 empowers the Commission to "modify" or "alter" an express congressional definition of career offender.

Finally, it should be noted that the

Petition herein raises a further issue regarding the degree of deference, and the parameters of deference, to be accorded Sentencing Commission enactments by construing courts. (Petition, at 21-22.) The sole response of the Government to this contention is citation to Stinson v. United States, 113 S. Ct. 1913, 1914 (1993), wherein the Court held that guideline commentary is authoritative unless ". . . it violates the Constitution or a federal statute. . . ." (B.I.O., page 12, fn. 8.) It is Petitioner's contention that the subject commentary is directly violative of express congressional language in Section 994(h)(1)(B), by presuming to modify and expand the express statutory definition of career offender.

B. **The Adequacy of Counsel/Continuance Issues**

The Brief in Opposition herein asserts that the Petitioner's claim of prosecutorial misconduct in opposing reasonable trial continuances, and the validation of inadequate trial preparation time on the ground that appointed counsel had "volunteered" to take this case, likewise merit no scrutiny by the Court. In support of this claim, the United States merely repeats the findings of the Court of Appeals. (B.I.O., pages 12-13.) Petitioner's counsel will not burden the Court with a restatement of previous arguments, but would simply emphasize that prosecutorial misleading of the trial court on the issue of continuance, and the "volunteer" theory to deprive

counsel of adequate time to prepare, are matters so centrally important to the fair administration of justice that they should be directly addressed and repudiated.

II.

CONCLUSION

By virtue of the foregoing considerations, counsel for Petitioner respectfully prays the Court for issuance of a writ of certiorari in the instant case.

Date: 7-8-94 Respectfully submitted

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